No. 92-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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The Government's position is that Section 1500 automatically requires dismissal of a claim in the Court of Federal Claims if, at any time during the pendency of that claim, the plaintiff ever had pending elsewhere a "related" case against the Government or its agents (*i.e.*, a case growing out of the same facts). This is so, the Government contends, even though the "related" suit was on a distinct claim that by law *had* to be brought in a different forum, even though Congress nowhere required an election between "related" remedies, and even though the plaintiff can immediately refile its claim in the Court of Federal Claims once the "related" action is no longer pending. Gov't Br. 20-21. The Government must acknowledge, of course, that by the time the plaintiff can proceed in the Court of Federal Claims, some or all of the original claims in that court may have been lost, either as a practical matter (through sheer delay) or by operation of law (statutes of limitations). Gov't Br. 40-41,

43-44. The Government nevertheless reads Section 1500 as Congress's underhanded means of stripping litigants, through an inescapable delay requirement, of legal rights that it elsewhere expressly gave. *See* Pet. 24-28.

Nothing in the Government's brief, however, remotely demonstrates that Congress has actually made such an implausible choice. To the contrary, the acknowledged policy of Section 1500—the avoidance of improperly duplicative simultaneous litigation burdens on the Government (Gov't Br. 20-21)—is fully served under *our* view of Section 1500, through the Court of Federal Claims' obligation to stay its proceedings where necessary to avoid true duplication of suits. *See* Pet. Br. 41-42 (citing cases). What the Government really seeks from its construction of Section 1500, then, is the unavoidable forfeiture of congressionally granted legal rights against it—a "protection" that is inconsistent with other congressional directives. The Government's position thus would "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other" (*Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947)), a result that conflicts with the judicial duty of "reconciling many laws enacted over time, and getting them to 'make sense' in combination" (*United States v. Fausto*, 484 U.S. 439, 453 (1988)).

In these circumstances, only the most compelling case of unambiguous textual necessity could conceivably support adoption of the Government's position. But there plainly is no such case. Nothing in the Government's brief undermines our common-sense reading of the statute: (1) Section 1500 applies only if two cases against the Government would be improperly duplicative under *res judicata* law and so does *not* apply when Congress has mandated separate suits (Pet. Br. 18-32); and (2) Section 1500 in no event requires dismissal of an action *after* any other suit is no longer pending (Pet. Br. 33-42). Moreover, the contrary reading, which plainly would be both new and harsh, cannot justifiably be applied here to deprive Keene of its rights.

A. Section 1500 Covers Dual Suits Against the United States Only if They Involve the Same Claim Under the Law of Claim Preclusion.

In our view, a plaintiff has another case "for or in respect to" its claim in a Court of Federal Claims case only if the claims in the two cases are the same under the familiar body of law aimed at duplicative litigation—the law of *res judicata*. The Government responds that Section 1500 must be read to apply whenever the two claims are "related to," *i.e.*, grow out of the same "operative facts" as, one another. Gov't Br. 14-16, 22. But the text does not compel that reading (Gov't Br. 14-16); the legislative history does not support it (Gov't Br. 17-21); and it plainly repudiates settled precedent and renders Section 1500 incompatible with other statutes (Gov't Br. 21-28, 39-41).[1]

1. *Language.* The Government's assertion that "for or in respect to" unambiguously and plainly bears its proposed "related to"/"operative facts" meaning is simply insupportable.[2] The statement that a plaintiff has pend-

[1] The Government's intimation that our reading of Section 1500 is not properly presented (Gov't Br. 21 n.18) is frivolous. As the Government's own Brief in Opposition made explicit, the petition, *in addition to* seeking review of the "has pending" ruling below, squarely presented the question "[w]hether petitioner's actions against the United States involved the same claim for purposes of Section 1500." Br. in Opp. at I. Our argument, far from "rais[ing] additional questions or chang[ing] the substance of the questions already presented" (Sup. Ct. R. 24.1(a)), directly answers that question. *See also* Sup. Ct. R. 14.1(a).

[2] The Government quotes this Court's observation in *Corona Coal Co. v. United States*, 263 U.S. 537, 540 (1924), with respect to Section 1500's predecessor, that "the words of the statute are plain, with nothing in the context to make their meaning doubtful." Gov't Br. 14-15. But the statutory issue in *Corona* (whether the statute applied on appeal), as to which the statute *was* plain, has no bearing on the issue here. *See* Pet. Br. 38 n.23. Not even the Government contends, what would be preposterous, that a statute's lack of ambiguity on one issue somehow makes the statute unambiguous on all other issues.

ing a case "for or in respect to" a particular claim is quite naturally understood, as we suggest, to mean that the subject of the case is that very claim.[3] This reading reflects a familiar usage, one that is found in particular in cases and other materials specifically concerned with *res judicata*.[4] In fact, in the present context, this is a more natural meaning than the Government's notion that the case need only grow out of the same "operative facts" as, and thus be loosely "related to," the claim. Congress easily could have written Section 1500 to reach all claims growing out of, or arising from, the same subject matter or facts or transaction or dispute or controversy; but the statute is not written in any of those ways. Instead, Congress used a phrase that plainly must be read in its

[3] *See Webster's Third New International Dictionary of the English Language* 1934 (1986) ("with reference to"); *The American Heritage Dictionary* 1040, 1052-53 (2d Coll. ed. 1982) ("with respect to," like "regarding" or "as regards," equivalent to "with reference to"; "reference"); B. Garner, *A Dictionary of Modern Legal Usage* 480 (1987) ("The phrases *in respect of* and *with respect to* are usually best replaced by simpler expressions, such as single prepositions. See **regard** and **as regards**."); *id.* at 469 (usually, the phrases "in regard to" or "with regard to" "may advantageously be replaced by some simpler phrase such as *concerning, regarding, considering,* or even the simple prepositions *in, about,* or *for*").

[4] *See, e.g., G. & C. Merriam Co. v. Saalfield*, 241 U.S. 22, 29 (1916) ("The doctrine of *res judicata* furnishes a rule for the decision of a subsequent case between the same parties or their privies respecting the same cause of action."); *Lesser v. Gray*, 236 U.S. 70, 75 (1915) ("judgment in respect of the claim"); *Forsyth v. City of Hammond*, 166 U.S. 506, 518 (1897) ("a decision . . . in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions"); Restatement (Second) of Judgments § 17(3) (1982) (judgment is conclusive "with respect to any issue actually litigated and determined" if essential to the judgment). *See also* 28 U.S.C. § 1292(d)(2) (interlocutory appeal from Court of Federal Claims on legal question "with respect to which" well-grounded disagreement exists; analogue for district court, § 1292(b), says "as to which"); Sup. Ct. R. 10.2, 13.6, 14.1 (e)(ii), 20.3(a) ("in respect to" or "respecting" or "in respect of").

particular context and that can (and, here, does) bear the meaning we urge.[5]

Indeed, the Government's brief all but explicitly acknowledges that its case cannot rest on a plain or unambiguous meaning when, having transformed "in respect to" into "related to," it then states that its "operative facts" position "is *consistent with* this statutory language." Gov't Br. 22 (emphasis added). A claim of mere "consistency" is a confession that the text does not determine a single meaning. Beyond that, any plain meaning argument based on "for or in respect to" is contradicted by the utter novelty of the argument. Thus, in adopting this reading in *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1559-62 (1988), *cert. denied*, 489 U.S. 1066 (1989), the Federal Circuit not only never relied on the phrase but expressly found the statute "[l]acking a plain meaning" in this respect. *Id.* at 1560. Likewise, in opposing certiorari in *Johns-Manville*, the Government made no plain meaning argument based on "for or in respect to." 88-1052 Br. in Opp. 14-19. Nor did the Government make any such argument in opposing certiorari in the present case. Br. in Opp. 8-13. To the contrary, the Government repeatedly stated the question here as whether the several actions at issue "involved the *same* claim" (*id.* at I; *see also id.* at 9, 10) (empha-

[5] Not only the phrase "in respect to" and its equivalents are common in statutes, but so are the phrases "for or in respect to" and "for or with respect to." *E.g.*, 7 U.S.C. § 6a(2)(B); 12 U.S.C. §§ 95a(2), 632; 15 U.S.C. § 78kkk(b); 22 U.S.C. §§ 1631d, 4308(b); 26 U.S.C. 501(c)(21)(A)(i), 814(e)(1), 7206(4), 7301(a), 7341(a); 42 U.S.C. § 1395g(b); 46 U.S.C. § 1286. *See also Weber v. Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 67, 70 (1873); *United States v. Railroad Co.*, 84 U.S. (17 Wall.) 322, 325 (1872). Of course, legal language commonly employs such repetition for caution's sake, even if the terms barely differ in meaning. *See* B. Garner, *supra*, at 197-200; D. Mellinkoff, *The Language of the Law* 349-62 (1963); *cf. Dixson v. United States*, 465 U.S. 482 (1984) ("for or on behalf of," in 18 U.S.C. § 201(a)). Any "plain meaning" view that ignored context would presumably determine the meaning of these phrases wherever they were used.

sis added)—which not only contradicts the new "related to" reading but is precisely *our* reading of the statute, with the natural result that two claims against the Government are not the "same" for purposes of Section 1500 if they are not the "same" under the familiar body of law addressed to that problem (*res judicata* law).[6]

2. *Legislative History* The Government next argues that the 1868 legislative history of Section 1500's predecessor "confirms that Congress intended to bar simultaneous litigation of a dispute in the Court of Federal Claims and another court." Gov't Br. 17. The statute, however, does not use the Government's term "dispute," but speaks of "claims." And the 1868 legislative history neither does nor can support the Government's position.

First, on its own terms, the 1868 history simply does not show that Congress was aiming at different "claims" (non-mutuality aside) arising out of the same "dispute." To the contrary, Senator Edmunds, in discussing the statutory and common-law cotton claimants that were the sole object of his concern, treated the claims as the same, except for non-mutuality of the parties: he complained that the claimants had brought suit against federal officers and then brought "their claims" against the United States in the Court of Claims. *See* Pet. Br. 30-31; Gov't Br. 18-19. As far as his remarks (and the original text) indicate, Senator Edmunds' bill was designed to overcome only one limitation in *res judicata*'s

[6] The Government suggests at one point (Gov't Br. 22-23) that two claims are the "same" under *res judicata* law whenever they grow out of the same operative facts, even if jurisdictional rules mandate that the claims be brought separately. Gov't Br. 22-23. This suggestion, aside from ignoring the *substance* of preclusion law, is wrong. Both the First and Second Restatements make clear that the "mandatory separation" rule forms part of the definition of "What Constitutes the Same Cause of Action" (Restatement of Judgments, ch. 3, Title D heading, at 239 (1942)). *See* Restatement (Second) of Judgments, Title D, Introductory Note, at 195 ("The Scope of 'Claim' ").

definition of the "same cause of action"—that the parties to the proceedings had to be the same. *See Matson Navigation Co. v. United States*, 284 U.S. 352, 355-56 (1932).

The Government nevertheless asserts that the 1868 Congress *must* have contemplated coverage of claims deemed different under the law of *res judicata* (even assuming mutuality), because Congress must have viewed the statutory and common-law cotton claims as different in that sense. Gov't Br. 24 & n.10. But the Government offers no support for that critical assertion; and the claim is, in fact, insupportable. Under the "same evidence" rule widely used at the time, the common-law cotton claims (conversion) *were* the same for purposes of *res judicata* as the statutory cotton claims (conversion plus loyalty), except for the non-identity of the defendants (the exception addressed by the statute).[7] The Government does not even challenge the existence of the same evidence rule or its applicability to the cotton claims. *See* Gov't Br. 24 n.10.[8] Accordingly, there is simply nothing

[7] The same evidence rule—that two claims against a party arising from one transaction were the same under *res judicata* if the same evidence would suffice to prove both claims—was a familiar one. *See, e.g., Chapman v. Smith*, 57 U.S. (16 How.) 114, 133 (1854); *Lawrence v. Vernon*, 15 F. Cas. 84 (C.C. D. Mass. 1837) (Story, Circuit Justice); *Spicer v. United States*, 5 Ct. Cl. 34, 52 (1869) (Casey, C.J., dissenting), *rev'd*, 82 U.S. 51 (1873); Restatement (Second) of Judgments § 24 comment a (discussing old *res judicata* principles). *See also* cases and sources cited at Pet. Br. 32.

[8] The Government's only effort to address this point (Br. 24 n.10) is to suggest that the law was "far from clear," but its sole citation—a footnote in *Nevada v. United States*, 463 U.S. 110, 130 n.12 (1983)—does not help the Government's argument. That footnote quoted an earlier decision that made clear that the same-evidence test was not a *necessary* condition for treating the claims as the same under *res judicata* law. The Government offers no authority to deny that the same-evidence test would have established a *sufficient* condition (mutuality aside) for treating the statutory and

to the Government's central contention that the cotton claims would be outside the statute under our reading—and, therefore, nothing to the Government's reliance on the 1868 legislative history.

Second, and in any event, as a matter of proper statutory construction, the 1868 legislative history could not control the Court's interpretation of Section 1500 today. As our opening brief explains, the Government's view of Section 1500 would mandate delays, for years, in litigants' gaining of access to the Court of Federal Claims to vindicate legal rights that Congress gave them, thus producing—both through the delays themselves and perhaps through statute-of-limitations bars as well—inevitable forfeitures of rights and forced elections between distinct remedies that Congress intended to be meaningfully available and to supplement one another. These results are not just "harsh," as the Government says (Gov't Br. 39); they are clearly contrary to numerous statutes enacted since 1868, including the Tucker Act, the FTCA, the transfer statute (28 U.S.C. § 1631), and statutes of limitations. *See* Pet. Br. 25 & n.12. The proper judicial task is to read Section 1500 so that it comports with *today*'s statutory landscape.[9] Mere legislative history from 1868 cannot justify a construction of Section 1500, like the Government's, that would deeply undermine the *current* statutes with which Section 1500 necessarily interacts.[10]

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common-law cotton claims as the same under *res judicata* law, which is the only relevant point here.

[9] *See United States v. Fausto*, 484 U.S. at 453 ("The courts frequently . . . interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted. This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.").

[10] *See Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989) ("We should be reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute."); *Clark*, 332 U.S. at 488-89 ("Our task is to give all of [a statute]—1917 to 1941—the most harmonious, comprehensive meaning possible. . . . To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.").

There are special reasons for following that familiar approach in this case. The statute at issue was enacted in 1948, *not* in 1868. Moreover, there is no evidence of a considered congressional judgment, even in 1868, about the general implications of the enactment for the litigation of claims against the Government. *Cf. Clark*, 332 U.S. at 488 ("We are dealing with hasty legislation which Congress did not stop to perfect as an integrated whole."). Rather, the 40th Congress focused on only one problem, the cotton claims—which, by June 25, 1868, had almost all been filed already. *See* Captured and Abandoned Property Act of 1863, ch. 120, § 3, 12 Stat. 820 (claims had to be brought "within two years after the suppression of the rebellion"); *United States v. Anderson*, 76 U.S. (9 Wall.) 56, 70-71 (1869) (Aug. 20, 1866, was official date of "suppression"). In any event, no congressional judgment in 1868 could possibly reflect the radically different statutory landscape of today: the Tucker Act (1887), the FTCA (1946), and other statutes now broadly "'give the people of the United States what every civilized nation of the world has already done—the right to go into the courts to seek redress against the Government for their grievances.'" *United States v. Mitchell*, 463 U.S. 206, 213-14 (1983). Mere legislative history from 1868, perhaps regardless of what it said, cannot warrant reading Section 1500 to circumvent those and other current statutes.

3. *Case Law and Consequences.* Although the Federal Circuit recognized that its ruling required the overruling of established precedent dating back to 1956 (Pet. App. A17 n.3, A22), the Government tries to avoid the force of *stare decisis* as a powerful support for our read-

ing of Section 1500. Gov't Br. 25-28. But the Government explicitly acknowledges that its "related to"/"operative facts" interpretation of Section 1500 *is* inconsistent with settled precedent beginning with *Casman v. United States*, 135 Ct. Cl. 647 (1956). Gov't Br. 28. The Government's reading therefore *concededly* requires repudiation of more than a quarter century of precedent.

The Government asserts that *Casman* has been limited to cases involving claims for different types of relief (Gov't Br. 26-28), but even if true, the point would be irrelevant: the *Government*'s reading of Section 1500, by its own admission, is incompatible with *Casman*. Anyway, the Government's assertion is false. As the Government reluctantly concedes, the Court of Claims—the appellate court whose decisions are precedent for the Federal Circuit—had clearly recognized the full meaning of the *rationale* of *Casman* (that two claims are not the same if they *must* be brought separately) and applied it beyond claims for different types of relief. Gov't Br. 27 n.12. And the Government's citations (*id.* at 25, 26-27) do not refer to a single case in which the Court of Claims (or Federal Circuit) *prior* to *Johns-Manville*—the decision announcing the "operative facts" rule we are challenging—held that the *Casman* construction of Section 1500 was "limited" to claims for "different relief." [11]

[11] It is hardly surprising that cases *after Johns-Manville* would follow the logic of that decision. The only earlier appellate-court case the Government cites, *Pitt River Home & Agric. Coop. Assoc.*, 215 Ct. Cl. 959 (1977), contradicts rather than supports the Government's point. The court there found Section 1500 *not* to apply, explaining that Section 1500 applies only where "the same cause of action *and* claims for relief are asserted in the Court of Claims and other courts." 215 Ct. Cl. at 961 (emphasis added). (Even in the one pre-*Johns-Manville* decision of the *trial* court cited by the Government, *Hill v. United States*, 8 Cl. Ct. 382 (1985), the Section 1500 dismissal apparently could have rested on the ground that there is a single remedy for discrimination in employment by the federal government, *see Brown v. GSA*, 425 U.S. 820 (1976).)

In short, the Government's reading does reject decades of settled law.[12]

Turning from precedent, the Government argues that our reading would violate Section 1500's policy by subjecting the Government to duplicative litigation burdens. Gov't Br. 23-24, 39-40. This contention, however, begs the question of when Section 1500 deems two suits improperly duplicative: it *assumes*, but does not establish, that the separate litigation of distinct claims (which necessarily involve different issues and which Congress has demanded be brought separately) is improperly duplicative under Section 1500. In any event, the alleged consequence does not follow. The Government does not dispute that the Court of Federal Claims has the authority and is under a duty to stay its proceedings where necessary to coordinate them with other proceedings so as to avoid duplicative burdens. *See* Pet. Br. 41-42. That power and responsibility fully protect the Government's interest in avoiding duplicative burdens.

Finally, unlike the Federal Circuit, the Government tries to minimize the consequences of its reading of Section 1500: it points to the 6-year statute of limitations for claims under the Tucker Act and notes that in "cer-

[12] We note again that this law was settled—so that claimants against the United States were not being unfairly hindered by Section 1500—when Congress reenacted Section 1500 in 1982. *See* Pet. Br. 22-23. The Government observes that in 1992, after the decision below, Congress amended Section 1500 without adopting a proposal to repeal the provision. Gov't Br. 20 n.7, 25 n.11. But this sort of mere congressional failure to adopt a proposal cannot be accorded any significance. *See, e.g., Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980); *United States v. Wise*, 370 U.S. 405, 411 (1962). Nor does the timing of the 1992 amendment constitute a ratification of the Federal Circuit's *en banc* decision: that decision, which suddenly made Section 1500 so onerous, was anything but settled law at the time of the 1992 amendment; to the contrary, it presented a very live controversy, as this Court's subsequent grant of certiorari in the case shows.

tain specific" circumstances—involving federal employees or claims for no more than $10,000—Section 1500 need not impair the vindication of rights granted by Congress. Gov't Br. 40 n.20. But the identified circumstances are avowedly narrow ones: with those few exceptions, as the *amici* in this case amply show, there is no escaping the fact that most claimants with overlapping tort, contract, and constitutional claims against the Government are forced to bring separate lawsuits (for either similar or different types of relief)—and would therefore be subject to the delays and forfeitures attending the Government's construction of Section 1500. Moreover, the 6-year limitations period in no way alleviates the burdens of sheer delay (on litigants' ability to vindicate their rights and the courts' ability to adjudicate them) caused by a rule that would mandate postponement of litigation in the Court of Federal Claims. In addition, of course, if equitable tolling is unavailable, limitations problems will in fact regularly arise, particularly in "the most complex and protracted cases"—like the present one. Gov't Br. 40. The unjust and inefficient consequences of the Government's reading cannot be discounted.

B. Section 1500 Does Not Require Dismissal when the Plaintiff Does Not Have Another Action Pending in Another Court.

The Government also defends the dismissal of Keene's claims by arguing that Section 1500 rigidly demands dismissal of an action in the Court of Federal Claims whenever the plaintiff had another ("related") action pending in another court at *any* time during the action in the Court of Federal Claims. Gov't Br. 29-36. That position is utterly insupportable as an interpretation of Section 1500; indeed, the Government hardly argues it. And that is so even if (as is also wrong but need not be decided here) dismissal *is* required *while* another action is pending.

1. *No Longer Pending.* To begin with, the language of Section 1500 squarely contradicts the proposed interpretation. The statutory language applies only when the plaintiff "*has* pending" certain actions in other courts. The Government itself all but concedes that the provision does not apply once any other suit is over: "By its terms, however, the statute applies only if the plaintiff '*has pending* any suit or process in any other court.' 15 Stat. 77 (emphasis added). The language of the statute thus does not preclude a second adjudication if the first action is no longer 'pending.'" Gov't Br. 21.

Although the absence of textual support is reason enough to reject the Government's position, that position gains no further support if one looks beyond the statutory language. Notably, the pre-1948 statutory language used the same "*has* pending" language as the current provision. Pet. Br. 29 n.16; Gov't Br. 18 & 19 n.6. And the legislative history relied on by the Government—Senator Edmunds' statement in 1868—speaks of plaintiffs with dual suits "now pending" in the Court of Claims and in other courts. *See* Pet. Br. 30-31; Gov't Br. 18. Nor, finally, can the policy against simultaneous duplicative litigation possibly support dismissal of a case in the Court of Federal Claims when no other suit is pending.[13]

The Government's only "argument" is an assertion: "the fact that an action in another court has ended does not imply that the Court of Federal Claims had jurisdiction while the other action was pending." Gov't Br. 29. The simple answer to this statement is that, like the Fed-

[13] The Government suggests that its construction would help it keep track of overlapping suits brought in different courts. Gov't Br. 31-32. But even if that were a proper consideration in interpreting the statute, it cannot support a distortion of Section 1500's plain language (or a construction that produces forfeitures of legal rights). Anyway, a simple discovery request made to the plaintiff early in the litigation (or a pleading requirement) can fully inform the Government of any other suits.

eral Circuit's assertion that "[a]ll jurisdictional rules are absolute" (Pet. App. A17), it wholly sidesteps the issue actually presented. The question here is not whether the Court of Federal Claims "*had* jurisdiction" earlier in the lawsuit: it is whether the case must be dismissed if there was ever a "jurisdictional defect," even though that "defect" no longer exists. But the Government offers no argument whatsoever in defense of that position. Indeed, the Government does not even fall back on an analogy to diversity jurisdiction's "time of filing" rule, and for good reason: the analogy is hardly compelling; the rule is far from text-based and far from rigid; and the rule is inconsistent with the Government's view that dismissal is required even if a district court action is filed *after* the commencement of the case in the Court of Federal Claims.[14]

The Government's position is, in any event, flatly inconsistent with this Court's precedent. This Court's decision in *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), confirmed that a lack or loss of jurisdiction at some earlier stage of a lawsuit does *not* require dismissal after the jurisdictional defect is cured: diversity jurisdiction was lacking throughout the proceeding, but this Court held that the case should *not* be dismissed once diversity was present.[15] *A fortiori*, the "jurisdiction"

[14] The Government cannot rely on the time-of-filing rule borrowed from diversity jurisdiction without also accepting for Section 1500 the corollary that post-filing events do not destroy jurisdiction originally present (*see Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 111 S. Ct. 858, 860 (1991))—which the Government cannot do while it disagrees with the rule of *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966). Gov't Br. 36-38. It should be unnecessary for the Court to address the *Tecon* question in reversing the Federal Circuit's dismissal of Keene's claims.

[15] The Government tries to distinguish *Newman-Green* by saying that Fed. R. Civ. P. 21 provided a "source of authority" for the ruling. Gov't Br. 33. But since the Federal Rules "shall not be construed to extend . . . the jurisdiction of the United States district courts" (Fed. R. Civ. P. 82), what the Court held was that the statutory jurisdictional rule was flexible enough to accommodate practical concerns reflected in Rules authorized by Congress. Here, there are more than practical concerns and more than Federal Rules: the "jurisdictional" rule of Section 1500 is necessarily flexible enough to ensure that the *rights* granted in other *statutes* are not impaired. *See also* Fed. R. Civ. P. (Claims Ct. R.) 1 (policy to "secure the just, speedy, and inexpensive determination of every action").

label cannot require dismissal under Section 1500, which is merely a timing provision affecting cases indisputably within the Tucker Act's grant of jurisdiction to the Court of Federal Claims.[16]

Finally, the Government's position is inconsistent with decades of settled lower court precedent—as the Government explicitly acknowledges. Gov't Br. 34 (*Brown v. United States*, 358 F.2d 1002 (Ct. Cl. 1966), is "inconsistent with" Government's reading of Section 1500). Although the Government contends that "the holding of *Brown* is more circumscribed than petitioner suggests" (Gov't Br. 34), the Government does not dispute that, prior to the decision below, it was settled law in the Court of Claims, the Federal Circuit, and the Claims Court that Section 1500 presented no bar to hearing a case *after* the "other" action in another court was no longer pending. *See* Pet. Br. 39. Thus, the Government's position not only is unsupported by the statutory lan-

[16] The Government does not deny that both statutes of limitations and exhaustion provisions—timing rules—have been viewed as defining the courts' "jurisdiction," yet have been treated flexibly to avoid the loss of rights. *See Irwin v. Veterans Admin.*, 111 S. Ct. 453, 457 (1990); *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975). The Government's footnote on those cases (Gov't Br. 33 n.15) merely confirms our point: not all "jurisdictional" restrictions are of a piece. Indeed, this Court has openly followed a practical approach to more purely jurisdictional statutes such as 28 U.S.C. §§ 1257 and 1291. *See* Pet. Br. 36 n.20; *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 201-02 (1988). *See also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351-53 (1988) (court may remand removed pendent state-law claim to prevent "injustice" of expired limitations period and "expense" of new filing).

guage, history, and policy but requires repudiation of settled statutory precedent in defiance of the doctrine of *stare decisis*. *See also* note 12, *supra*.

2. *While Pending.* Although the issue need not be reached, even the premise of the Government's argument—that Section 1500 rigidly requires permanent dismissal *while* another action is pending—is incorrect. The text alone will not compel such a reading: "jurisdiction" in Section 1500 is properly read to mean "jurisdiction to render judgment" or "jurisdiction to adjudicate,"[17] so that dismissal of the case would not be required—a stay of proceedings would undoubtedly satisfy the statute. Moreover, that was the settled law prior to the decision in this case, under the precedent just discussed. Further, dismissal is not required to serve the statutory policy of avoiding duplicative litigation burdens: suspension will fully serve that goal. Finally, particularly (though not only) if the Government's "related to" position were adopted, a dismissal rule would undermine other congressional policies.[18]

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[17] *See* Pet. Br. 34 (citing language of provisions surrounding 28 U.S.C. § 1500); Gov't Br. 21 (Section 1500 "does not preclude a second *adjudication* if the first action is no longer 'pending'") (emphasis added). Contrary to the Government's suggestion (Gov't Br. 30 n.14), the varying expressions in the statutory provisions surrounding Section 1500 are properly viewed as equivalent in meaning, not as reflecting fine-tuned differences in meaning.

[18] The Government cites *Hallstrom v. Tillamook County*, 493 U.S. 20, 26-31 (1989), but that decision is consistent with our position here. Gov't Br. 33. The decision there rested on the explicit statutory language ("no action may be commenced"), the considered policy adopted by Congress that required the dismissal rule, and the ability of plaintiffs to protect their rights even with such a rule. 493 U.S. at 27-32. The same cannot be said of Section 1500, whose text is different, whose policy does not require automatic dismissal, and whose application would unavoidably result in loss of rights if a dismissal rule were adopted. In similar circumstances, dismissal has not been required. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 764-65 (1979); *Love v. Pullman Co.*, 404 U.S. 522 (1972).

The Government's rigid dismissal position, in fact, is inconsistent not only with settled lower court precedent but with this Court's holding in *Pennsylvania R.R. v. United States*, 363 U.S. 202 (1960). The Court there reversed a dismissal by the Court of Claims and, fully aware of the Section 1500 issue in the case, ordered that the case merely be suspended until completion of still-pending district court proceedings involving the same issues and dispute (in the Government's terms, "related" litigation). 363 U.S. at 203-04. The significance of that holding is confirmed, not weakened, by the fact that the Court did not expressly rule on (or the Government raise) the Section 1500 issue: the reason, plainly, was that Section 1500 was not understood to be the sort of "jurisdictional" provision that requires dismissal or that "cannot be waived by the parties or the court," as the Government now suggests. Gov't Br. 32. The Court's holding in *Pennsylvania R.R.* thus stands contrary to the Government's current rigid and absolute jurisdictional view of Section 1500.

C. The Federal Circuit's Interpretation of Section 1500, Even if Adopted, Should Not Defeat Keene's Claims.

Even if the Federal Circuit's reading of Section 1500 is found correct, it should not be applied to bar Keene's claims—for reasons of prospectivity and of equitable estoppel. Government's contrary position is unpersuasive.

1. *Prospectivity.* Although the Government says that prospectivity is never proper for jurisdictional rulings (Gov't Br. 41), it does not deny that this Court in fact held a decision that denied jurisdiction to be prospective in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-89 (1982). *See* Gov't Br. 41 n.21. Moreover, the Government's two precedents rejecting a prospectivity argument in a jurisdictional context (Gov't Br. 41-42, citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80 (1981)) are materially

different from the present case: the statutory rulings in those cases (which in any event did not overthrow settled precedent) meant that the cases were wholly outside any grant of jurisdiction to the courts, which therefore could not reach the merits; the present case involves only a timing restriction on the hearing of a case that concededly has always been within the grant of jurisdiction under the Tucker Act and that today plainly may be heard on the merits.[19] Further, the Government's general qualms about prospectivity (Gov't Br. 42-43) do not apply where, as here, the Court has power over the remedy as well as the choice of law. *See* Pet. Br. 43.

Prospectivity doctrine being available in this case, its application is clear. It cannot be seriously suggested that the decision below, which candidly overruled numerous settled precedents, did not "break[] any new legal ground." Gov't Br. 43. And there can be no clearer case of unfair surprise, and loss of rights pursued in good faith (the consequence if equitable tolling is unavailable), than the present.

2. *Equitable Tolling.* Once it is accepted that equitable tolling "may be available in some circumstances" (Gov't Br. 41, 44), it is clear that it should be available here. First, the issue is properly presented as part of the statutory analysis. As the Government itself recognizes, the availability of equitable tolling is intertwined with an evaluation of the consequences, and hence validity, of its reading of the statute. *See* Gov't Br. 41. In any event, in this decade-long litigation, this Court surely has discretion to avoid further delay in reaching the merits by speaking to the proper remedy—*e.g.*, a supplemental complaint making dismissal inappropriate, a new filing that reaches back to the commencement of Keene's suits in 1979 and 1981—if the radical change of law announced by the *en banc* Federal Circuit is approved.

[19] The Government misses the point when it says that in *Firestone* and *Budinich* there was diversity jurisdiction and so "the court had jurisdiction to decide that 'type' of case." Gov't Br. 42. It was the jurisdiction of the *court of appeals* that was at issue in those cases, and found wholly lacking (*i.e.*, outside any statute granting jurisdiction to the court of appeals); the district court's jurisdiction (under 28 U.S.C. § 1332) was irrelevant.

Second, on the merits, equitable tolling is plainly proper under *Irwin v. Veterans Admin.*, 111 S. Ct. 453 (1990), to avoid a patent "injustice." *Carnegie-Mellon*, 484 U.S. at 352. Keene did everything possible to pursue its remedies against the Government not only "actively" (111 S. Ct. at 457-58) but expeditiously and efficiently: instead of filing thousands of separate third-party claims, it attempted to streamline the litigation by consolidating its tort claims in district court and its Tucker Act claims in the Court of Claims—separately, of course, because Congress has so required. *See* Pet. Br. 7 (Keene voluntarily dismissed *Miller* action for consolidation purposes). Moreover, although it is *not* necessary for equitable tolling that the Government have "induced or tricked" Keene into allowing the statute of limitations to pass (*ibid.*), this case in fact involves conduct of that order: the Government initially filed a Section 1500 motion in 1980, then withdrew the motion for "'tactical reasons'" (*see* Pet. Br. 5), and did not raise the issue, or seek the overturning of established precedent, until prompted by the Claims Court in 1987. By that time, of course, Keene had lost the opportunity to make any necessary election of remedies and to file new actions in the Claims Court without having lost the years of claims that are now at risk absent equitable tolling.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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